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the corporation receives a consideration, the right to be no longer held liable for the debt, which although negative in character is nevertheless of substantial value; and if the purpose of the transaction is in reality to promote the corporate interest, and not merely to evade the law, there should be no objection to the corporation's so issuing its bonds.

The principal case is to be distinguished from the situation in which the corporation issues stock or bonds as security for a pre-existing debt, without receiving for such issuance a binding extension of the time in which to pay the debt or any other present consideration; in such a case, unless a past consideration is involved, it is clear that the stock or bonds are not issued for "property actually received."⁶ And it is hard to see how a past consideration, although it may be under certain circumstances a good consideration for a contract,⁷ can be held to constitute a consideration of substantial value within the meaning of provisions intended to protect the public from worthless stock and bonds.

The decision in the principal case raises a question as to the validity of the practice common among corporations of issuing new stock for old. But it would seem that this could legally be done in the promotion of bona fide corporate purposes, for by the surrender of the old stock the corporation receives a consideration of substantial value for the issuance of the new; furthermore, from the point of view of the provisions under consideration there is no fundamental difference between issuing stock in payment of corporate debts, a proceeding which is clearly valid,⁸ and issuing new stock for old.

R. E. H.

EMINENT DOMAIN: COSTS AND ATTORNEY'S FEES.—The taxing of costs is regulated entirely by statute; at common law neither of the parties to an action could recover costs.¹ The statutory rules as to costs must, however, be so applied as not to conflict with the constitutional requirement, "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner,—which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."² *City of Oakland v. Pacific Coast Lumber and Mill Company*³ was

⁶ *Nichols v. Waukesha Canning Co.* (1912), 195 Fed. 807; *Kemmerer v. St. Louis Blast Furnace Co.* (1914), 212 Fed. 63.

⁷ Cal. Civ. Code, § 1606.

⁸ See cases cited, *supra*, n. 5.

¹ *Williams v. Flowers* (1890), 90 Ala. 136, 7 So. 439; *Kummeth v. Atkisson* (1913), 23 Cal. App. 401, 138 Pac. 116; *Bond v. United Railroads of San Francisco* (1912), 20 Cal. App. 124, 128 Pac. 786.

² Cal. Const. Art I, § 14.

³ (Mar. 16, 1916), 51 Cal. Dec. 383, 156 Pac. 468.

a proceeding instituted to condemn land; the landowner took an appeal which was entirely unsuccessful; the court held that it could award the condemnor his costs on appeal without violating the above quoted provision of the constitution. This decision proceeds upon the theory that "just compensation" means the *full* sum awarded by the jury as compensation to the landowner, undiminished by the payment of any costs, other than those resulting from the landowner's own unnecessary acts, such as his unsuccessful appeals and new trials in which the jury's award is not increased, acts which are ultimately shown not to have been essential to his securing just compensation.⁴

This theory seems both just and sound.⁵ Since it is the duty of the condemning party to pay just compensation for the property taken, it is the duty of such condemning party to ascertain, in the manner provided by law, what amounts to just compensation, and to bear the expenses of such ascertainment other than those needlessly caused by the landowner. To require the landowner to pay any of the expenses necessary to the determination of the just compensation to which he is entitled, or any of the expenses needlessly incurred by the condemnor, is to require him to part with his property for a sum falling short of just compensation by the amount which he is thus required to pay.

It is hard, however, to reconcile with the theory of the principal case an earlier decision, that the costs, which just compensation requires that the landowner recover, only include statutory allowances, and not such a disbursement as a reasonable attorney's fee.⁶ To allow the meaning of the constitutional provision here involved to be determined by the arbitrary statutory definition of the word "costs" is upon principle hardly justifiable. Looked at from the point of view of just compensation as guaranteed by the constitution, there is no distinction between the necessary expenses of a condemnation proceeding which are made taxable by statute, and those which are not so made taxable. For example, where the condemnor appeals to require the landowner to pay his own reasonable attorney's fees paid out in sustaining his judgment—a necessary expense⁷ which is not included within the statutory

⁴ For the earlier steps in the development of this theory see *San Francisco v. Collins* (1893), 98 Cal. 259, 33 Pac. 56; *Los Angeles etc. Ry. Co. v. Rumpff* (1894), 104 Cal. 20, 37 Pac. 859; *San Joaquin etc. Irr. Co. v. Stevenson* (1913), 165 Cal. 540, 132 Pac. 1021.

⁵ *Kitsap County v. Melker* (1909), 52 Wash. 49, 100 Pac. 150; *Dolores No. 2 Land and Canal Co. v. Hartman* (1892), 17 Colo. 138, 29 Pac. 378; *Petersburg School Dist. of Nelson County v. Peterson* (1905), 14 N. D. 344, 103 N. W. 756; *Stolze v. Milwaukee etc. Co.* (1902), 113 Wis. 44, 88 N. W. 919. *Contra*, *In re Post Office Site in Borough of the Bronx* (1914), 210 Fed. 832; *In re Low* (1913), 208 N. Y. 25, 101 N. E. 706.

⁶ *Pacific Gas and Electric Co. v. Chubb* (1914), 24 Cal. App. 265, 141 Pac. 36.

⁷ Without question an attorney's services are necessary where an appeal is taken.

meaning of the word costs⁸—would as effectively reduce the just compensation awarded him by the jury as would the requirements that he pay his statutory costs. Just compensation requires that all the necessary expenses of each of the parties in an eminent domain proceeding be paid by the condemnor. The condemnor accordingly should, we submit, pay the landowner's reasonable attorney's fees wherever the services of an attorney are necessary to insure the landowner's securing just compensation.

R. E. H.

INHERITANCE TAX: TAXING THE SURVIVOR OF JOINT TENANTS. —An inheritance tax is a constitutional excise tax levied upon the right of succession.¹ In California such a tax is even imposed upon a surviving wife's share in community property,² and upon a probate homestead.³ The question then arises as to whether the interest of the survivor of joint tenants is subject to the tax. The Supreme Court in *McDougald v. Boyd*⁴ held that it was not. The case arose out of the State's attempt to tax the survivor's interest in a joint account in a savings bank, which account was held in joint tenancy. The court, after deciding that such a joint interest was not taxable under the statute of 1911, adds that "a provision bearing upon this matter was enacted for the first time in the Act of 1913," and cites section 3c. The fair inference from this would appear to be that a survivor's interest would be taxable under the act of 1913, in virtue of section 3c. The matter is of great concern to those persons who have transferred their property in joint tenancy since 1913, for the reason that in such a case the law of the date of the transfer governs.⁵ Strangely enough, however, the clause in question appears identically in the statute of 1911,⁶ among the sections on appraisement and valuation. The same clause appears in the inheritance tax law of three other States and in each is found among the sections on appraisement and valuation.⁷ This would seem to indicate that the section was not intended to cover the question of joint tenancy, and this is supported by the fact

⁸ Cal. Code Civ. Proc., § 1021; *Miller v. Kehoe* (1895), 107 Cal. 340, 40 Pac. 485.

¹ *Knowlton v. Moore* (1899), 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747; *Snyder v. Bettman* (1902), 190 U. S. 249, 47 L. Ed. 1035, 23 Sup. Ct. Rep. 803; *In re Wilmerding* (1897), 117 Cal. 281, 49 Pac. 181.

² *Estate of Moffitt* (1908), 153 Cal. 359, 95 Pac. 653, 20 L. R. A. (N. S.) 207; 4 California Law Review, 156.

³ Cal. Stats. 1911, p. 714; Cal. Stats. 1913, p. 1068. Overruling *Estate of Kennedy* (1910), 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428, as to probate homestead, but not as to family allowances.

⁴ (June 24, 1916), 52 Cal. Dec. 4, 159 Pac. 168.

⁵ *In re Webber* (1912), 151 App. Dec. 539, 136 N. Y. Supp. 83.

⁶ Cal. Stats. 1911, p. 721.

⁷ Minn. Stats. 1911, c. 209; Wisc. Stats. 1903; Okla. Stats. 1908, c. 81.